Reliance Shipping & Travel Agencies v Low Ban Siong

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–23–95

SITI NORMA YAAKOB, VC GEORGE JJCA AND AHMAD FAIRUZ J

29 FEBRUARY 1996

***Contract** — Breach of contract — Damages — Actual damages suffered not proved — Whether entitled to compensation stated in contract — Contracts Act 1950 s 75*

***Contract** — Penalty clause — Employement contract — Employee to pay compensation of RM20,000 in the event he did not serve company for three years — Whether amounted to penalty — Whether clause enforceable — Whether company should prove actual damages suffered — Contracts Act 1950 s 75*

The appellants, who were tour and travel operators ('the employer'), appointed the respondent ('the employee') as their tour representative. Pursuant to an agreement entered between the employer and the employee ('the agreement'), the employee undertook to serve the employer for a minimum period of three years in consideration for the on-the-job training given to him. Under art VI of the agreement, the employee further agreed to pay RM20,000 as agreed compensation to the employer if he failed to fulfil his obligations the agreement. The employee tendered his resignation after having served only two years and 2½ months, and the employer sued him for the liquidated sum of RM20,000. The employer succeeded in their claim in the sessions court. The High Court, however, reversed the decision of the sessions court on the grounds that: (i) the RM20,000 claimed being a penalty was unenforceable; and (ii) it was incumbent upon the employer to prove the actual damage incurred by them for providing the on-the-job training for the employee. The employer appealed. The issue before the court was the interpretation to be given to art VI read together with s 75 of the Contracts Act 1950 ('the Act').

Held, dismissing the appeal:

(1) A clause in an agreement falling within s 75 must be subject to the court's determination that such agreed damages is reasonable compensation for the injured party (see p 547D); *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155 followed.

(2) Despite the qualifying words 'whether or not actual damage or loss is proved to have been caused thereby' in the Act, damages allegedly suffered must be proved (see p 547B); *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179 and *SS Maniam v The State of Perak* [1957] 23 MLJ 75 followed.

(3) The qualifying words in s 75 are limited to those cases where the court would find it difficult to assess damages for the actual damage or loss (see p 547E–F); *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 followed.

(4) In this case, the measure of damages stated in the agreement was enforceable provided that there was proof by the employer that they had suffered loss or damage limited to the extent of the quantum of the 'agreed compensation'. The loss suffered by the employer here was, inter alia, the expenses incurred for providing on-the-job training to the employee, which was not difficult for the employer to provie. The trial judge, however, found that no such proof was forthcoming from the employer, and this court find no reason to disturb the judge's finding (see pp 547H–I and 548A).

[Bahasa Malaysia summary

Perayu, yang merupakan pengendali khidmat pelancongan dan perlawatan ('majikan'), telah melantik penentang ('pekerja tersebut') sebagai wakil pelancongan mereka. Mengikut suatu perjanjian yang diikat antara majikan dan pekerja tersebut ('perjanjian tersebut'), pekerja tersebut telah berjanji untuk berkhidmat dengan majikan untuk jangkamasa minima selama tiga tahun sebagai balasan latihan sambil bekerja yang diberikan kepadanya. Di bawah perkara VI perjanjian tersebut, pekejar tersebut selanjutnya bersetuju untuk membayar RM20,000 sebagai ganti rugi yang dipersetujui kepada majikan jika dia gagal memenuhi kewajipannya di bawah perjanjian tersebut. Pekerja tersebut telah memberikan surat pemberhentian kerjanya selepas berkhidmat hanya untuk selama dua tahun dan 2½ bulan, dan majikannya pun mendakwanya untuk ganti rugi jumlah tertentu sebanyak RM20,000. Majikan tersebut berjaya dalam tuntutan mereka di mahkamah sesyen. Walau bagaimanapun, Mahkamah Tinggi telah mengakas keputusan mahkamah sesyen atas alasan bahawa: (i) tuntutan RM20,000 tersebut merupakan penalti, dan dengan itu tidak boleh dikuatkuasakan; dan (ii) majikan perlu membuktikan kerugian sebenar yang telah mereka alami dalam memberikan latihan sambil bekerja kepada pekerja. Majikan tersebut telah membuat rayuan. Isu yang harus dipertimbangkan oleh mahkamah ialah tafsiran yang harus diberikan kepada perkara VI dibaca bersama dengan s 75 Akta Kontrak 1950 ('Akta tersebut').

Diputuskan, menolak rayuan itu:

(1) Sesuatu fasal dalam perjanjian yang dirangkumi oleh s 75 adalah tertakluk kepada pertimbangan mahkamah sama ada ganti rugi yang dipersetujui tersebut adalah munasabah kepada pihak yang mengalami kerugian (lihat ms 547D); *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155 diikut.

(2) Walaupun terdapat perkataan-perkataan pengecualian 'sama ada atau tidak kerugian atau kehilangan yang sebenar telah dibuktikan telahpun disebabkan olehnya' dalam s 75 Akta tersebut, kerugian yang dikatakan telah dialami itu mesti dibuktikan (lihat ms 547B); *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179 dan *SS Maniam v The State of Perak* [1957] 23 MLJ 75 dikut.

(3) Perkataan-perkataan pengecualian dalam s 75 adalah dihadkan kepada kes-kes di mana adalah sukar untuk mahkamah menaksirkan jumlah kerugian bagi kerugian atau kehilangan sebenarnya (lihat ms 547E–F); *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 diikut.

(4) Dalam kes ini, sukatan ganti rugi yang dinyatakan dalam perjanjian boleh dikuatkuasa dengan syarat jika terdapat bukti oleh majikan bahawa mereka telah mengalami kehilangan atau kerosakan yang terhad kepada takat kuantum 'ganti rugi yang telah dipersetujui'. Kehilangan yang dialami oleh majikan di sini ialah, antara lain, perbelanjaan yang dialami dalam memberikan latihan sambil bekerja kepada pekerja, yang tidak susah untuk dibuktikan oleh majikan. Walau bagaimanapun, hakim perbicaraan mendapati bahawa majikan tidak mengemukakan bukti sedemikian, dan mahkamah ini tidak dapat mencari apa-apa sebab untuk mengganggu keputusan hakim yang berkenaan (lihat ms 547H–I dan 548A).]

Notes

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1185–1242.

Cases referred to

Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC 179
Jagathesan v Linggi Plantations Ltd [1969] 2 MLJ 255
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995]1 MLJ 817
SS Maniam v The State of Perak [1957] 23 MLJ 75
Wearne Bros (M) Ltd v Jackson [1966] 2 MLJ 155

Legislation referred to

Contracts Act 1950 s 75
Contract Act 1872 s 74 [Ind]

Appeal from: Civil Appeal No R1–12–132–93 (High Court, Kuala Lumpur)

LC Chong (CH Foong with him) *(LC Chong & Co)* for the appellant.
K Lopez (W Pareira with him) *(Kamarudin & Partners)* for the respondent.

Cur Adv Vult A

Siti Norma Yaakob JCA (delivering the judgment of the court): We had after hearing arguments dismissed this appeal with costs.

The factual background of this appeal is not disputed. The appellants/plaintiffs who are tour and travel operators had sued the respondent/ B defendant in the sessions court for a liquidated sum of RM20,000 being the agreed compensation payable to the appellants for breach of a term of an agreement dated 9 March 1987 ('the agreement') entered into between them.

Pursuant to a letter of appointment dated 27 February 1987, the C appellants appointed the respondent as their tour representative and in that capacity the respondent was given on-the-job training as a tour guide. In consideration for such training, the respondent undertook to serve the appellants for a minimum period of three years and subject to other terms and conditions contained in the agreement. For the purpose of this appeal, article VI of the agreement is most significant and it reads as follows: D

Article VI

> The Employee shall work with the Company for a minimum period of three (3) years commencing from 9 March 1987. In the event the Employee should leave the Company within the said period, the Employee shall pay the sum of Ringgit Twenty Thousand (RM20,000) as agreed compensation E to the Company for the job training given to the Employee.

In breach of article VI, the respondent tendered his resignation on 23 May 1989 after having served only two years and 2½ months, and in the sessions court the appellants succeeded in their claim for RM20,000 as agreed compensation under article VI. F

Dissatisfied, the respondent appealed and Dato Azmel Maamor J, allowed the respondent's appeal and set aside the judgment entered against him. It was the appeal against this part of the judge's order, that we are concerned with and the only issue before us is the interpretation to be given to article VI read together with s 75 of the Contracts Act 1950. G

The fact that article VI falls within the ambit of s 75 is acknowledged by the parties and for ease of reference, I reproduce the provisions of s 75.

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is H entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

There is a line of authorities as to the effect and extent of s 75. I

I begin with *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179, where s 74 of the Indian Contract Act 1872 which contains similar provisions as our s 75 was interpreted by Lord Atkin as follows:

> The effect of s 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered

Thus, it is clear that as early as 1929, despite the qualifying words 'whether or not actual damage or loss is proved to have been caused thereby,' damages allegedly suffered must be proved. *Bhai Panna Singh*'s case was quoted with approval by Thomson J (as he then was) in the case of *SS Maniam v The State of Perak* [1957] 23 MLJ 75 where his Lordship confirmed that 'in this country there is no difference between penalty and liquidated damages', and in cases whether agreed deposits can be forfeited as damages for the breach of a number so stipulated must depend on whether the amounts forfeited are reasonable. See also the case of *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 255.

Again in *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155, the same principles of law were adopted, when Abdul Aziz J held that a clause in an agreement falling within s 75 must be subject to the court's determination that such agreed damages is reasonable compensation for the injured party.

The recent judgment of the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, gives a complete picture of how s 75 is to be interpreted and after going through all the authorities including those cited above, Peh Swee Chin FCJ concluded that the qualifying words in s 75 'whether or not actual damage or loss is proved to have been caused thereby' are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as opposed to all other cases, where a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways'.

Having stated the law, we now turn to the facts of the appeal before us. Dato Azmel Maamor J reversed the decision of the sessions court on the grounds:

(1) that the RM20,000 claimed being a penalty is unenforceable; and

(2) that it is incumbent upon the appellants to prove the actual damage incurred by them for providing the on-the-job training for the respondent.

Whilst we endorse the latter of the learned judge's finding, we consider the former of his finding to be erroneous. Despite the nature of the amount stated in the agreement, the measure of damages is enforceable provided that there is proof by the appellants that they had suffered loss or damage limited to the extent of the quantum of the 'agreed compensation'. In this case, the nature of the loss suffered by the appellants is inter alia the expenses incurred by them for providing on-the-job training for the respondent. They should not have any difficulty in proving that loss if they had kept an account of the total expenses incurred for such training. The learned judge however found that no such proof was forthcoming from the

appellants as they were content to rely on the amount stipulated in the agreement as their measure of damages without proving actual loss. We found no reason to disturb the finding of the learned judge, and we had accordingly dismissed the appeal with costs and ordered the deposit be paid to the respondent to account of his taxed costs.

Order accordingly.

Reported by Jafisah Jaafar